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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-145

MILDRED A. PICKNEY, Personal Representative of Joe Pickney, Deceased, for herself and for DAVID R. PICKNEY, MRS. WALTER C. HAWKINS, and THOMAS E. PICKNEY, a minor, by his Guardian ad litem, Mildred A. Pickney,
Plaintiffs and Petitioners,

vs.

ORO DAM CONSTRUCTORS, a joint venture, etc., et al., and WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Defendants and Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. FACTUAL BACKGROUND

The petitioners in this proceeding are the purported widow (and legal representative) of David R. Pickney, deceased, and the surviving heirs of said decedent. Pickney, at the time of his death on Oct. 7, 1965, was employed by respondent, Oro Dam Con-

structors (hereinafter O.D.C.), and was on duty as such at that time. This action was brought purportedly pursuant to the Federal Employers Liability Act, 45 U.S.C. 51 et seq. (hereinafter F.E.L.A.).

O.D.C. was, at all material times, a joint venture consisting of seven corporations and one individual, organized for the purpose of constructing a dam across the Feather River, at a location some 5.5 miles easterly (upstream) from Oroville, California. This construction was undertaken shortly following February 18, 1963, pursuant to contractual arrangements between O.D.C. and the State of California, Department of Water Resources (hereinafter "State"). The main line of the Western Pacific ("W.P.") prior to 1963, extending eastward from Oroville, was located in the canyon of the Feather River, and was therefore subject to being inundated by the water held back by the completed dam. W.P. and the State therefore contracted for the building of a relocated line, which was completed and placed in service on February 18, 1963. Thereupon W.P. wholly abandoned all operations over the former line in the Feather River Canyon, although by agreement W.P. reserved the right to perform common carrier service over that part of the former line which extended up to the Dam site, if request was made for such service. No such request was ever made, and no such common carrier service over that line was ever performed subsequent to February 18, 1963, by either W.P. or any other person or agency.

The W.P.'s new (i.e., relocated) line departed from its former line at a point in the Feather River

Canyon designated as Zephyr, located about two miles upstream (i.e., eastward) from Oroville. The former line, extending eastward from Zephyr to the Dam site, a distance of about 6.2 miles, was conveyed by W.P. to the State. After the rails thereon had been replaced, this state-owned trackage was used by O.D.C., as part of the railroad trackage employed by O.D.C. to move gravel and other like materials from a borrow pit west of Oroville, up to the Dam site. This line was also used occasionally to move machinery, or other equipment and materials, loaded in freight cars which were billed to O.D.C., or in its care, *at Zephyr.* Such loaded cars were moved to Zephyr by W.P., and there delivered to O.D.C., as the actual consignee, usually specified as such on the shipping documents.

W.P. did not participate in, control, or supervise any of these movements, or any other movements, made by O.D.C. over the state-owned trackage, either easterly from Zephyr to the Dam site, or westerly to the borrow pit.

The decedent Pickney was employed by O.D.C. as an engineer operating locomotives upon the state-owned trackage between the borrow pit and the Dam site, passing through Zephyr. While working in this capacity, on October 7, 1965, upon a locomotive hauling open-top cars loaded with gravel and like materials from the borrow pits near Oroville eastward to the Dam site, his locomotive collided head-on with a similar locomotive hauling empty cars westward to the borrow pit. Pickney was killed in this collision.

The accident occurred at a point about 2.5 miles east of Zephyr, and thus upon a section of line which had been abandoned and relinquished by W.P. some two-and-a-half years earlier.

It was expressly conceded, in open court by petitioners (Tr., 119-120)[1], that the decedent was not engaged in interstate commerce at the time of the accident.

This action was brought in the United States District Court for the Eastern District of California, by the personal representative (Mildred A. Pickney) of the decedent, for herself and certain others, assertedly pursuant to the F.E.L.A. Damages are demanded in the amount of $300,000.00 (R. 82).[1]

II. PROCEEDINGS IN THE DISTRICT COURT AND THE COURT OF APPEALS

The proceedings in the District Court were in response to a motion for a preliminary hearing, under Rule 12(d), F.R.C.P., to determine whether the Court had jurisdiction in the premises (R. 269-270). That hearing, held on April 14 and 16, 1969, was duly reported.

While petitioners have attached to their petition a copy of the opinion and decision of the Court of Appeals rendered on April 30, 1971 (now officially

[1]References to the Clerk's Transcript of the Record herein are indicated by the letter R. and the page number. References to the Reporter's Transcript of the proceedings before the District Court are indicated by the letters Tr. and the page number.

reported, 441 F.2d 806-808) which they seek to have reviewed, they have wholly omitted any mention of the Findings made by the District Court which initially heard and decided this case.

In summary, the District Court found: (1) the decedent Pickney was employed by O.D.C., and at the time of the accident was acting in the scope of his said employment; (2) decedent was covered by Workmen's Compensation Insurance, obtained by O.D.C.; and an award had been made to his surviving son; (3) O.D.C. was not a railroad common carrier, had never held itself as such, and at the time of the accident was not engaged in interstate commerce; (4) W.P. had no right to supervise, direct, or control the decedent, and did not do so; decedent was never an employee of W.P., or of any interstate railroad common carrier; (5) W.P. and O.D.C. were never engaged in any joint enterprise as claimed by plaintiffs; O.D.C. was never an agent or employee of W.P.; no freight was consigned to the Dam site; W.P. never hauled any freight to the Dam site; O.D.C. never engaged in hauling interstate freight shipments for W.P., or under any contract with W.P., or otherwise, or at all.

Upon the basis of these findings the District Court concluded that plaintiffs had no cause of action against either O.D.C. or W.P., predicated upon F.E.L.A., and that it (the Court) had no jurisdiction in the premises. Judgment was entered accordingly (R. 378-380). Said judgment is reproduced as an appendix to petitioners' brief.

The appeal to the Court of Appeals for the Ninth Circuit followed in due course, and as stated that Court's decision was rendered on April 30, 1971. In its opinion the Court remarked particularly that there was "*no conflict* in the evidence", which statement was followed by a recital of the facts, virtually reproducing the findings made by the District Court.

III. ARGUMENT

1. THE FINDINGS OF FACT OF THE TRIAL COURT ARE BASED UPON UNCONTRADICTED EVIDENCE, AND ARE ADEQUATE AND CONTROLLING.

While petitioners do not expressly challenge the correctness of the findings of fact made by the District Court, it is apparently their position that other findings should have been made in response to the evidence, and also that other inferences should have been, but were not, drawn from the evidence by the District and Appellate Courts.

The Court of Appeals stated, in its opinion (441 F.2d at p. 107), that all of the track, equipment, and area involved were under the exclusive jurisdiction, supervision, and control of O.D.C. This statement was based largely upon portions of the District Court's Findings Nos. 4 and 5; and these findings, in turn, reflect the undisputed testimony produced before that Court. Nevertheless petitioners now assert (their brief, p. 15) that W.P. had the *right to control* O.D.C.'s operation of the railroad line between Zephyr and the Dam site.

The same argument was made in petitioner's presentation to the Court of Appeals (their brief in that Court, pp. 22-27), and was rejected, by that Court, in the same vein as the earlier conclusions of the District Court, viz., "that W.P. never exercised any direct or indirect supervision, control or direction over any of the operations or employees of O.D.C."

Furthermore, at several passages of their brief, petitioners employ expressions intended to convey the conclusion that O.D.C. was operating as a common carrier, "subject to Interstate Commerce Commission control", in handling freight cars from Zephyr to the Dam site (or to the borrow pit) and return (e.g., pp. 1, 5, 10: "the movement of *interstate freight* between Zephyr and the Dam").

These statements (or inferences) find no support whatsoever in the record. To the contrary, the District Court specifically found as a fact (Finding No. 3, R. 374) that O.D.C. was *"not a common carrier,"* and "never held itself out to be a *common carrier*", and was *not* engaged in . . . *"interstate commerce"* at any time.

There is simply no basis for petitioners' attempts to misconstrue, challenge, or otherwise seek to alter the meaning and effect of the District Court's findings. Having been based upon adequate evidence, which was wholly undisputed, those findings by the Court, sitting without a jury, are immune to attack upon this attempted appeal.

Rule 52(a), F.R.C.P., expressly provides that in actions such as this, tried upon the facts without a

jury, findings of fact *shall not* be set aside unless clearly erroneous.

Compare, also:

Zenith Radio Corp. v. Hazeltine Research (1969), 395 U.S. 100, 123;

Commissioner v. Duberstein (1960), 363 U.S. 278, 289-291;

U.S. v. National Ass'n, etc. (1950), 339 U.S. 485, 495-496.

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2. THE DECISION OF THE COURT OF APPEALS IS SUPPORTED IN PRINCIPLE BY NUMEROUS EARLIER DECISIONS INVOLVING SIMILAR FACT SITUATIONS.

There have been many decisions of the Courts, including not less than three by this Court, which involved facts much the same as in the case at bench, in each of which the final ruling was the same as the rulings made here by the Courts below. These decisions include:

Edwards v. Pacific Fruit Express Co. (1968), 390 U.S. 538;

Wells Fargo & Co. v. Taylor (1920), 254 U.S. 175;

Robinson v. Baltimore & Ohio R. Co. (1915), 237 U.S. 84;

Goulden v. S.P. Co. (C.A. 9, 1949), 174 F.2d 1022;

Hetman v. Fruit Growers Exp. Co. (C.A. 3, 1965), 346 F.2d 947;

Aguirre v. S.P. Co. (1965), 232 Cal.App.2d 636;

Moleton v. Union Pac. R. Co. (1950), 118 Utah 107, 219 P.2d 1080.

The essence of the decision in the *Edwards* case was that an employee of Pacific Fruit Express Co. (P.F.E.) could not maintain an F.E.L.A. action against that company because P.F.E., although a subsidiary of two railroads (Southern Pacific and Union Pacific) was not a "common carrier by railroad". This Court cited its own earlier decisions in *Taylor* and *Robinson,* in which similar rulings were made. Reference was also made, in *Edwards,* to the *Gaulden, Aguirre,* and *Moleton* cases, each of which was an attempted action brought under F.E.L.A., by an employee of P.F.E., against one or the other of the two railroad companies which together own P.F.E. and utilize its services pursuant to contract. In each of these cases it was held that an employee of P.F.E. was not an employee of the parent railroad; and that, as an employee of a company which was not a common carrier, he could not maintain an F.E.L.A. action. It may be noted that in *Moleton,* certiorari was denied (340 U.S. 932).

Since it is admitted here that the decedent was never employed by W.P., the only interstate common carrier involved, but only by O.D.C., and it is fully shown (and expressly found) that O.D.C. was not a common carrier at any time, those facts are completely adequate to bar this attempted action.

The contention is made, however, that the inbound carload shipments arriving over the W.P. at Zephyr, and handled from that point to the location of ultimate use, continued to be shipments in interstate commerce until actually unloaded, and that in consequence O.D.C. was engaged in interstate commerce, because of having hauled such supposed interstate shipments. This contention is discussed briefly elsewhere in this reply, with reference to the authority (*Erie R. Co. v. Shuart* (1919), 250 U.S. 465) upon which petitioners rely. Apart from the plain inapplicability of the *Shuart* case to the facts here shown, there are several decisions since the date of that decision, which demonstrate that petitioner's argument is invalid. Among the more noteworthy of these cases are the following:

Kelly v. General Electric Co. (E.D. Pa., 1953), 110 F.Supp. 4 (aff'd, C.A. 3, 1953, 204 F.2d 692; cert. denied, 1953, 346 U.S. 886);

Tilson v. Ford Motor Co. (D.C. Mich., 1955), 130 F.Supp. 676;

Duffy v. Armco Steel Corp. (D.C. Pa., 1964), 225 F.Supp. 737 (aff'd, C.A. 3, 1964; 380 F.2d 644);

Ciaccio v. N. O. Public Belt R. Co. (D.C. La., 1968), 285 F.Supp. 373;

Ciaccio v. N. O. Public Belt R. Co. (D.C. La., 1968), 290 F.Supp. 196;

Grider v. C.B. & Q. Ry. Co. (Ill. App., 1965), 207 N.E.2d 703.

Each of these cases involved a fact situation similar in its essentials to the fact situation in the case at bench; i.e., (1) a rail facility owned by an industry

whose principal business was other than operating a railroad; (2) the use of that railroad facility to move cars, both loaded and empty, between a connection with a common-carrier railroad and one or more locations where cars delivered at the connection were either loaded or unloaded; (3) an employee of the industry, whose duties involved the movement of such cars over the employer-industry's rail facilities, but not beyond; (4) an injury incurred while performing such duties; (5) an action for damages predicated upon F.E.L.A. In each case the action was dismissed, upon the ground that F.E.L.A. was by its terms inapplicable and unavailable. As note *ante*, one of these cases (*Kelly v. General Electric Co.*), certiorari was denied by this Court (346 U.S. 886).

In its opinion herein the Court of Appeals referred (p. 808) to the decision in *Lone Star Steel Co. v. McGee* (C.A. 5, 1967), 380 F.2d 640 (cert. den., 1967, 389 U.S. 977) as setting forth the tests which determine whether a particular company or entity is an interstate common carrier by railroad within the meaning of F.E.L.A. These tests, as stated in *Lone Star* (380 F.2d at p. 647), are as follows: (1) actual performance of rail service; (2) which service is performed as a part of total rail service contracted for by a member of the public; (3) performance by the entity as a part of a system of interstate rail transportation, pursuant to common ownership or by contract with a railroad; and (4) receipt of remuneration for the service performed.

These same criteria were recently recited again in the opinion in *McCrea v. Harris Co. etc. District*

(C.A. 5, 1970), 423 F.2d 605 (cert. den., 1970; 400 U.S. 852).

It is apparent from the record here that O.D.C., as the decedent's admitted employer, did not come within the scope of any one of the *Lone Star* criteria, let alone all four. First, O.D.C. did not perform any "service" for anyone. It operated locomotives hauling cars over tracks, but only for its own purposes, and not for anyone else. Second, none of O.D.C.'s rail operations were a part of a rail service contracted for by anyone. No member of the public ever contracted for, or ever requested, rail service by O.D.C. or over its rails, or could have done so; there was literally no habitation or industry in that area, other than O.D.C.'s facilities. Third, O.D.C. never operated as a part of any system of transportation, pursuant to either contract or common ownership. O.D.C. and W.P. were completely independent; and O.D.C.'s contract with W.P. was concerned solely with the *protection* of W.P.'s properties, not with the *operation* of O.D.C.'s *facilities*. Fourth, no monetary or other remuneration was received by O.D.C. on account of its railroad operations; none could be so received, for O.D.C. was hauling only freight which it either owned, or was planning to use in its dam-building project.

The decision of the Court of Appeals here sought to be reviewed and reversed is thus on all fours with all of the relevant and controlling authorities. Three of these decisions, which were rendered by Courts of Appeal, were afterwards brought to this Court's attention by petitions for certiorari, and such petitions were in each case denied.

3. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS CITED BY PETITIONERS, OR WITH ANY OTHER BINDING PRONOUNCEMENT OF AN APPELLATE TRIBUNAL.

Apparently recognizing that this Court's Rule 19 (1)(b) sets forth the character of the reasons which this Court will consider in passing upon their petition, petitioners assert (their brief, p. 38) that the Court of Appeals has herein decided the federal question (of applicability of F.E.L.A. in the premises) in a way in conflict with (1) applicable decisions of this Court, and (2) the decision of another Court of Appeals dealing with the same question.

The decisions of this Court to which petitioners refer are:

Sinkler v. Missouri Pacific R. Co. (1958), 356 U.S. 326;

Erie R. Co. v. Shuart (1919), 250 U.S. 465.

The decision of the Court of Appeals, cited by petitioners in this connection, is:

Kach v. Monessen S.W. Ry. Co. (C.A. 3, 1945), 151 F.2d 400.

The question in the *Sinkler* case was, as in the case at bench, whether the injured person could maintain an F.E.L.A. action; but the facts were entirely different. Sinkler, the claimant, was admittedly an employee of Missouri Pacific, a railroad common carrier in interstate commerce, and was injured while on duty in one of its cars. The injury was allegedly due to the negligence of the Houston Belt & Terminal Railway Co., a switching (i.e., terminal) carrier at Houston, Texas, likewise a common carrier by rail-

road in interstate commerce, which as such was acting as an agent of Missouri Pacific at the time of Sinkler's injury. In these circumstances it was held by this Court that Sinkler could bring his action, under F.E.L.A., against his employer, to recover damages for injury caused by his employer's agent. The essence of this Court's opinion was that since the Belt Line was performing for the Missouri Pacific certain "operational activities" of that railroad (i.e., the picking-up and/or delivery of cars which had been or were to be handled in line-haul movement by Missouri Pacific), it was in effect the agent of that line-haul carrier.

The differences of fact between *Sinkler* and the case at bench are so clear, and so substantial, as to render that case wholly inapposite here. In *Sinkler,* the injured plaintiff was an employee of the defendant interstate railroad. In the case at bench, the decedent was admittedly never an employee of the defendant railroad (W.P.) In *Sinkler,* the injury was allegedly due to the negligence of an agent of the employer, which was held to have that status (as agent) because it performed, *for the railroad employer,* services which otherwise the latter would have been obligated to perform. In the case at bench, the negligence, if any, which allegedly caused Pickney's death was that of O.D.C., which was never an agent of W.P., never performed any service which W.P. was otherwise obligated to perform (no request for such service having ever been made), and was never controlled in any respect by W.P. Finally, the company (the Belt Ry.) allegedly responsible for Sink-

ler's injury was itself a common carrier, and the alleged injury was sustained at the time of, and in conjunction with its operation as such; whereas in the case at bench the entity (O.D.C.) allegedly responsible for Pickney's injury was not, and never had been, a common carrier; moreover, Pickney's injury was sustained in the course of an operation (by O.D.C.) which was wholly local in character (the movement of gravel from the borrow pit to the Dam site), and did not have any possible relation to interstate commerce.

The *Erie Railroad* case (250 U.S. 465), is without any bearing upon the questions sought to be presented here. In *Erie* this Court held that freight (in this case, live horses) loaded in a car which was being spotted for unloading after arrival at the billed destination, but had not yet been unloaded, was still in the course of transportation by the carrier in possession, and would have continued so until the actual unloading at the billed destination had been completed. The billing of the car contemplated that such unloading would be performed *by the railroad* at the billed destination. Petitioners herein refer to the fact that some 79 or more loaded cars are shown to have been billed from various origin points to O.D.C., or in its car, for delivery at W.P.'s station at Zephyr, and to have been delivered there to O.D.C., and urge that these cars were not unloaded at Zephyr, but were instead moved by O.D.C. from Zephyr to either the Dam site or the borrow pits for unloading. From this petitioners argue (their brief, pp. 26, 37, 38) that these cars were still moving in interstate commerce,

when being handled by O.D.C., and until finally unloaded. The *Erie* case does not in the least support petitioners' argument. In *Erie,* as this Court's opinion shows, the contract of carriage called for the movement of the loaded carload to the billed destination, and for the carrier to unload the cargo (the horses) at that destination. Until this agreed unloading by the carrier was completed, the transportation service contemplated by the parties was still in progress.

In the case at bench, by contrast, the billing contained no reference to unloading at Zephyr, the billed destination, nor was it contemplated that any cars would be unloaded at that station. The common-carrier transportation service in interstate commerce performed by W.P., as the delivering carrier, was complete and was ended, when the loaded cars were placed on the siding at Zephyr where O.D.C. could and did take possession. Any movement of these cars thereafter was undertaken, *by O.D.C.,* for its own purposes, at such times and under such conditions as it might elect; but such movements were not and could not have been in "interstate commerce", because (1) O.D.C. was not a common carrier, (2) O.D.C. was not moving these cars for account of W.P., or any one else other than itself, or persons or companies immediately associated with it in the Dam project, (3) O.D.C. never acted on behalf of W.P., in handling these shipments to locations beyond Zephyr.

As the Court of Appeals pointed out in its opinion herein:

"The evidence simply did not show that O.D.C. had in fact ever moved any freight for others over the track in question. However, even conceding arguendo that O.D.C. had on occasions moved freight from Zephyr to the Dam site, there was absolutely no evidence that it had engaged in any such activity for or on behalf of W.P. or as a common carrier . . .".

Compare, also, the District Court's finding that *no* freight was consigned *to the Dam site;* that *W.P. never* hauled any freight *to the Dam* site; and that O.D.C. never engaged in hauling interstate freight shipments for W.P., or otherwise *or at all* (R. 375).

The decision of the Court of Appeals in the case of *Kach v. Monessen S.W. Ry. Co.,* supra, is of dubious value, in the light of its own facts; and in any event, that decision has no bearing here because of substantial and controlling differences. Among these differences are: (1) The Monessen S.W. Ry. Co., the employer of the allegedly injured plaintiff Kach, was a common carrier by railroad which (though not itself in interstate commerce) regularly handled loaded cars containing interstate shipments. O.D.C., the actual employer here, was never a common carrier, and never handled any shipments, until after their movement in interstate commerce had been completed, or before such interstate movement commenced; (2) Monessen charged and received monetary compensation for the transportation services which it performed. O.D.C. never received or demanded any such compensation; in fact, to have "collected" such charges would have been merely a "paper" transaction, because O.D.C.

was moving only its own freight or freight which it intended to use; thus to have made "charges" would have meant merely that the moneys were shifted from one pocket to another. (3) Monessen was organized for the purpose of performing transportation, and this was its *only* activity. O.D.C. was not organized for any such purpose; its movement of cars over the State-owned trackage was merely incidental to its primary purpose: i.e., the building of the dam. (4) Interstate shipments hauled inbound by Monessen were actually billed for delivery at the appropriate unloading points, at the plants of Monessen's parent company and sole owner. Interstate outbound shipments were similarly billed from the parent's plant, and handled from those billing points by Monessen. Inbound shipments thus did not complete their journeys, in interstate commerce, until delivered by Monessen at the billed destinations; and outbound shipments commenced their interstate journeys, when picked up at the plants by Monessen. By contract, inbound shipments to O.D.C. were never billed to the Dam site (or the borrow pit), or over the State-owned O.D.C. trackage, for any movement. All such shipments were billed to O.D.C. (or in its care) *at Zephyr,* and were delivered there, thus ending their movement in interstate commerce. Outbound shipments were handled similarly; i.e., such shipments moved as *billed* shipments *from Zephyr,* as the original billing point, and not from any other point of origin. (5) Monessen was owned by the steel company whose traffic Monessen principally handled, but the two were nevertheless separate and distinct entities.

Monessen's rail operations were thus separate and distinct from the manufacturing operations of the steel company. By contrast, O.D.C.'s railroad operations were not separately organized or conducted, but on the contrary were an integral, though relatively minor, part of the entire dam-building project.

It will be seen that the *Kach* case clearly does not reach to, or even resemble in any degree, the case at bench, when the factual distinctions between the two are fully understood. There was here, as the Courts below both impliedly found, simply no through movement of interstate freight beyond Zephyr, by W.P., or any other common carrier, or anyone else on behalf of W.P., or otherwise; no involvement of any common carrier in such movement; no relationship of any kind between the duties performed by the petitioners' decedent, and the conduct of interstate commerce by W.P. In short, in view of the factual distinctions, the *Kach* case simply has no application here, and the decision of the Court of Appeals herein cannot be held to be in conflict with that decision.

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4. INACCURATE STATEMENTS AND ERRONEOUS INFERENCES CONTAINED IN PETITIONERS' BRIEF:

(a) The contracts between the State and W.P.

In rather confused fashion, petitioners attempt (their brief, pp. 3-5, 8-11), to argue that certain contracts entered into between the State and W.P., prior to the relocation of W.P.'s line and the commencement of the construction of the Dam, provided for

common-carrier service to and from the Dam site; hence, so petitioners assert, rail service between Zephyr and the Dam site, even though performed by O.D.C., must have been performed pursuant to this contract and the discharge of W.P.'s alleged obligation to provide such service, and hence was performance of a common carrier "operational activity" by O.D.C., on behalf of W.P. and as its agent.

This argument loses sight of two controlling facts, which petitioners fail to mention: (1) W.P., when by agreement it abandoned the (State-owned) trackage formerly a part of its line east of Zephyr, reserved only the *right (if requested)* to perform service over the abandoned trackage, but did not hold itself out to do so, *unless requested;* and as the record abundantly shows and petitioners admitted, and the District Court expressly found, W.P. did not at any time haul freight to the Dam site (and was never requested to);

(2) No "common carrier" service of any kind was even required, or performed, over the State-owned trackage between Zephyr and the Dam site, because O.D.C. was handling only its own freight, or freight of others consigned in care of O.D.C., and in so doing was not acting as agent of, or in concert with, W.P.

(b) The published tariffs in evidence as Plaintiff' Exhibit 9 (R. 339-346).

At page 11 of their brief petitioners refer to "published tariffs for moving freight from Oroville to Oroville Dam"; and in subsequent passages it is asserted that such rates were published "which would apply on traffic movements over the spur track . . .

out of Zephyr, from Zephyr to the Dam". These statements or inferences are knowingly and designedly false, as is shown (1) by the tariffs themselves, and (2) by the sworn testimony of petitioners' own witness Marken (Tr. 63-66). The tariff items expressly show (R. 339-346) that the per-car rates there set forth applied only "*from* Oroville *to* Zephyr", prior to Sept. 25, 1963, and *between* Oroville *and* Zephyr (i.e., in either direction), after that date (R. 343). The testimony of Mr. Marken, given in response to leading questions from petitioners' counsel, showed that the rates in question applied only to movements "to the connection" (i.e., to Zephyr), and not to any movement beyond (Tr. 62-65).

It is not shown, or claimed by petitioners, that any traffic moved under these particular rates; indeed, the record indicates (R. 293, 356) that these rates were never actually applied. In any event, and if such traffic did so move, that movement *under these rates* either ended or began at Zephyr, not at the Dam. W.P. never operated beyond Zephyr at any time after February 18, 1963; and O.D.C. was not a party to these rates, nor an agent of W.P. for the purpose of performing transportation service (or any other service) that W.P. might have been (but never was) called upon to perform.

In short, petitioner's argument and assertions in respect to the rates between Oroville and Zephyr are deliberately misleading, and squarely contradicted by the specific tariffs themselves, by the testimony of the tariff expert whom they called as their principal wit-

ness, and by the verified replies of W.P. to petitioners' interrogatories (R. 293, 356).

(c) The freight bills covering shipments handled by W.P. to or from Zephyr.

At pages 5-8 of their brief petitioners refer to the 79 freight bills furnished to their counsel, which covered inbound carload shipments handled by W.P. to Zephyr, and there delivered to O.D.C. as either the actual consignee or the authorized receiver of the freight. Apparently it is petitioners' position that the cars represented by these freight bills could not have ended their movement at Zephyr, but must have been moved further (i.e., to the Dam site or some other location where the contents could be used), and therefore continued to be in interstate commerce (v. pp. 7-8, 37-38 of their brief).

It may be quite true that, as occasion required, O.D.C. moved these cars from Zephyr, over the State-owned trackage, to locations reached by that trackage; but it is equally clear that such moves were not made in interstate commerce, or by an interstate common carrier by railroad. The only interstate common carrier involved was W.P.; and as the record shows, and both the Courts below have held:

> "Western Pacific never delivered or directed the delivery of anything beyond Zephyr. All of Western Pacific's common carrier activities terminated at Zephyr". (441 F.2d at p. 808; and see, also, Finding 5 of the District Court: R. 375).

In point of fact, and as the record indicates, any such moves of loaded freight cars beyond Zephyr

were made by O.D.C. for its own account and its own purposes; the contents of the cars were in all instances O.D.C.'s own property. There is simply no showing at all that O.D.C. ever moved a single car for account of anyone else, or ever collected or sought to collect compensation for such a move.

The freight bills relied upon by petitioners are clear and cogent evidence that when the cars to which they relate arrived at Zephyr and were delivered to O.D.C., their movement in interstate commerce had been completed. O.D.C. was not a common carrier in interstate commerce; and the subsequent moves of these cars by O.D.C. were not movements in interstate commerce.

(d) The alleged "right" of W.P. to control O.D.C.'s operations on the State-owned trackage.

Petitioners again urge (their brief, pp. 15-16), as they did in the Courts below, that by virtue of a contract dated October 26, 1962, W.P. had the right to control O.D.C.'s operations upon the railroad line between Zephyr and the Dam site; i.e., the railroad line conveyed by W.P. to the State, and which petitioners now, for some undisclosed reason, choose to identify erroneously as *"Western Pacific Railroad Co.'s* right of way between Zephyr and Oroville Dam".

The contract provisions upon which petitioners rely are quoted at page 16 of their brief. The contract plainly requires only that the contractor (O.D.C.) shall so conduct its operations as not to "endanger or interfere with the safe operation of the tracks and property of the Railroad", (i.e., W.P.). The latter,

through its Chief Engineer, was authorized to require such acts or changes on the part of O.D.C. as might be needed to eliminate hazards to or interferences with W.P.'s own operations *on W.P.'s own newly constructed railroad*. The Chief Engineer was not, however, empowered to direct O.D.C. when or whether to operate a train, or if so what speeds to observe, or the number of cars to be included, or any other details of O.D.C.'s operations. His instructions to O.D.C. could be only for the purpose of eliminating interferences with W.P.'s own operations, and not otherwise.

There is no showing that W.P. ever undertook to exercise any control over O.D.C.'s operations, and in fact no attempt was ever made by petitioners to support this claim. It may be noted, also, that petitioners admitted on the record (Tr. 139) that W.P. did not have any control over the decedent.

(e) The insurance policies issued to W.P.

At pages 16-24 of their brief petitioners quote at length from the text of two insurance policies issued *to W.P.* prior to the date of decedent's accident, and apparently in effect on that date; and at pages 32-35 a somewhat disjointed argument is attempted, the substance of which is that W.P., by obtaining these policies, admitted that it had a contingent liability, in the event of a personal injury incurred in the course of operations by O.D.C. over the State-owned trackage.

Petitioner's premises in conjunction with this argument are not only false, but are fully known by them

to be of that character; furthermore, their conclusions are illogical and erroneous.

Thus, at page 16 of petitioners' brief, it is asserted (and emphasized in capitals) that there was "an Insurance Policy protecting W.P.'s continuing duty to provide common carrier service at the Dam for the State and others should O.D.C.'s common carrier service be disrupted".

In fact, W.P. did not have any duty, continuing or otherwise, after February 18, 1963, to provide service to the Dam. On or shortly after that date, W.P. abandoned the trackage east of Zephyr for all purposes, and transferred ownership thereof to the State. We emphasize again that no request for service over this trackage was ever made upon W.P. thereafter, and no such service was performed.

The quoted statement is further misleading and erroneous, in stating or implying that O.D.C.'s operations were "*common carrier service*". All of the evidence in this record is to the contrary, and the Court of Appeals expressly stated in its opinion that "the railroad . . . operated by O.D.C. clearly is not a common carrier".

The fact is that the insurance policy referred to by petitioners was obtained by O.D.C., pursuant to the agreement between W.P. and the State dated Oct. 26, 1962, for the purpose of protecting W.P. against loss occasioned by interruptions of railroad operations upon its own *relocated* mainline, if such interruptions were caused by O.D.C.'s activities upon the *old* main line (after the transfer to the State, and during the

use thereafter by O.D.C.). The *old* main line closely adjoined the new line for a considerable distance east of Zephyr, and there was thought to be a possibility that O.D.C.'s activities on the *old* line (such as bank widening, rerailing, and the like) might interfere with W.P.'s operations on its (new) main line. The insurance policy would effectively save W.P. from loss in such circumstances. This purpose is made clear from the portions of the text of the policy quoted at pages 17-18 of the petitioners' brief.

The policy referred to under Item (10), pages 20-25 of petitioners' brief, was likewise primarily for the benefit of W.P., in that it protected W.P. against claims for damage to property, or injury to persons, arising out of O.D.C.'s activities. In line with their other misrepresentations, petitioners in their discussion of this policy refer to an alleged contract which, as they say, "made provision for O.D.C. to collect for the freight it hauled for others". The record here shows affirmatively that O.D.C. never hauled freight for others, and of course did not collect from others for a service which it did not perform. Both of the Courts below in effect found that O.D.C. never engaged in hauling freight for others. As the Court of Appeals said (441 F.2d at p. 807):

> "The evidence simply did not show that O.D.C. had in fact moved any freight for others over the track in question".

Petitioners assert (their brief, p. 32) that by obtaining insurance against claims made under F.E.L.A., W.P. had admitted that "jurisdiction under F.E.L.A."

existed with respect to employees of O.D.C. The suggestion is completely fanciful. It is obvious that many claims may be made against a railroad (or other employer), some of which may have merit, while others (such as the instant claim) clearly have no merit at all. Nevertheless a defense must be provided for virtually all, irrespective of merit. Defense of these claims, meritorious or not, involves expense; and that expense frequently can be best taken care of by means of insurance. W.P.'s insurance here was clearly only for the purpose of assuring a defense to any and all claims; it could not be regarded as an admission that any one claim, or group of claims, had any validity.

IV. CONCLUSION

This case is neither novel nor unsual. On the contrary, it involves facts and circumstances which have been presented in both the Federal and State Courts, again and again. In each such case involving similar facts as shown herein, it has been held that F.E.L.A. is not applicable. The same result should follow here, and the petition should therefore be denied.

Dated, Sacramento, California,
August 23, 1971.

Respectfully submitted,

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